THEODORE J. ALMASY

IBLA 93-424 Decided November 29, 1995

Appeal from a decision of the Alaska State Office, Bureau of Land Management, dismissing protest of Native allotment application F-029368.

Affirmed.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Contests and Protests: Generally

   Where protests of a Native allotment application were presented prior to passage of sec. 905(a)(5)(C), 43 U.S.C. § 1634(a)(5)(C) (1988), or filed after the 180-day period specified in the Act, both are properly dismissed and will not bar legislative approval of the allotment application.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

   Notice of location of homesite was not a "record entry or application" within the scope of sec. 905(e) of ANILCA, 43 U.S.C. § 1634(e) (1988), where notice of location never ripened into an application and the entry was declared void with administrative finality prior to the enactment of ANILCA.

APPEARANCES: Theodore J. Almasy, McGrath, Alaska, pro se; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Theodore J. Almasy has appealed from an April 22, 1993, decision of the Alaska State Office, Bureau of Land Management (BLM), dismissing Almasy's challenge to the Native allotment application of Kuzuma Effemka, F-029365. BLM has filed a motion to expedite consideration of this appeal. For good cause shown, that motion is granted.

On August 11, 1961, Almasy filed a notice of location of homesite, pursuant to 43 U.S.C. §§ 687a and 687a-1 (1982), describing a 5-acre tract in then unsurveyed sec. 35, T. 19 N., R. 44 W., Seward Meridian,

near Sleetmute, Alaska. That particular legislation (repealed 1976, by P.L. 94-579 (Oct. 21, 1976)), provided for the qualified purchase of a homestead in Alaska after occupying a suitable site "in a habitable house not less than five months each year for three years," subject, however, to the limitation that "[a]pplication to purchase claims, along with the required proof of showing, must be filed within five years after the filing of the notice of claim." See also 43 CFR Subpart 2563; Robert E. Billstrom, 129 IBLA 108 (1994). Almasy amended his notice of location on October 11, 1961, to provide a detailed course and distance description.

On March 20, 1962, Effemka's Native allotment application was filed for 160 acres of land in "Secs. 35 and 36, T. 19 N. R. 44 W., Seward Meridian, Alaska." Effemka asserted use and occupancy of the applied-for land beginning June 1, 1938. During the next several years, Almasy and BLM debated over the location of Effemka's allotment claim, and whether it conflicted with Almasy's homestead claim.

On February 14, 1966, BLM reminded Almasy by letter that he was required to file an application to purchase and proof of compliance by August 11, 1966. On August 12, 1966, in the absence of the required documents, BLM declared Almasy's notice of location of homesite null and void. Almasy did not appeal the decision.

During this period, BLM proceeded to review Effemka's Native allotment application. Effemka, however, passed away December 3, 1967. Based on an adverse field report dated June 25, 1974, BLM notified Effemka's heirs of its intent to reject the allotment application on the basis of a failure to demonstrate the prerequisite use and occupancy of the applied-for land. BLM also indicated that it deemed the land mineral in character due to the presence of mercury in the vicinity. However, that latter issue was further reviewed within the Department (to later be decided in favor of the applicant) and, therefore, a decision rejecting the application was not forthcoming. Moreover, Effemka's heirs challenged BLM's findings, followed later by a hearing request. Those challenges also prompted BLM to delay rendering a determination in this matter.

Subsequently, on December 2, 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2371. As a result, BLM concluded in a June 30, 1983, decision that allotment application F-029365 was "legislatively approved effective June 1, 1981, pending confirmation of location," and rejected a conflicting village selection application to the extent it embraced lands within Effemka's allotment.

On May 20, 1986, Almasy filed an "affidavit" with the Department, insisting that Effemka's Native allotment application included lands occupied by Almasy. After that document was forwarded, BLM responded in an informal letter dated July 1, 1986, explaining that BLM no longer

had jurisdiction over the land in question because the allotment application had been legislatively approved since no protest was filed within the 180-day statutory period stipulated in ANILCA. BLM added that Almasy's notice of location of homesite was rejected for failure to make the required showing, and the case file had been closed.

On April 22, 1993, BLM issued the decision challenged herein, dismissing Almasy's May 20, 1986, filing as a protest under section 905(a) of ANILCA because it was untimely; rejecting a village selection application to the extent that it conflicted with Effemka's Native allotment application; and ordering that the allotment be conformed to Lot 2, U.S. Survey No. 9607, Alaska (filed June 5, 1992). This appeal ensued.

In his statement of reasons, Almasy asserts that "my original protest was (and should still be as the case is still open) a matter of BLM record dating back to close to twenty (20) years prior to June 1, 1981; and therefore my letter of May 20, 1986 is only a reminder that the matter had been addressed and was believed corrected and resolved" (emphasis in original). As for his claim to the land at issue, Almasy insists that his cabin was built in its present location 6 years before Effemka settled in his present location, that Effemka had never occupied any part of the land where Almasy's cabin is located, and that his homesite, being filed first as shown by the serial number, should take precedence. Almasy also contends that Effemka never satisfied the requirements for a Native allotment since the land at issue was never vacant, as evidenced by him and reported by the field examiner. He notes that Effemka's claim was never monumented, but "was nothing more than a paper claim to unsurveyed lands staked on a map." Almasy reports that Effemka once confided in him that Effemka intended to claim land other than the Almasy homesite.

[1] Section 905(a) of ANILCA, 43 U.S.C. § 1634(a) (1988), provides that, with stated exceptions and exclusions, pending Native allotment applications for land that was "unreserved on December 13, 1968 * * * are hereby approved on the one hundred and eightieth day following December 2, 1980." As this statute was intended to promote conveyance finality, legislative approval under this section had the effect of removing the Department's authority to examine or reexamine the question of entitlement or to further condition the scope of the grant. State of Alaska, 110 IBLA 224, 228 (1989).

One of the exceptions to legislative approval, found in section 905(a)(5)(C), provides that legislative approval does not apply if within the specified period

> [a] person or entity files a protest with the Secretary stating that the applicant is not entitled to the land described in the allotment application and that said land is the situs of improvements claimed by the person or entity.

43 U.S.C. § 1634(a)(5)(C) (1988). Hence, under section 905(a)(5)(C), Almasy, who claim improvements on the land described in a Native Allotment application, was required to file a protest of such application within 180 days of the enactment of ANILCA.

It is well-established that to bar legislative approval under section 905, a protest must met three prerequisites: A protest must be filed; the protest must be filed within the 180-day deadline established by section 905(a); and the protestant must assert and, if necessary, demonstrate that improvements claimed by him or her exist on the land. See Erma M. Webster, 131 IBLA 329, 331 (1994) and cases cited.

The second prerequisite was not met in this case. There is no evidence of a protest having been filed within the time specified by section 905(a)(1). It obvious that the "protest" filed May 20, 1986, was untimely and therefore must be rejected. E.g., Marshall McManus, 126 IBLA 168, 172 (1993). Moreover, Almasy's argument that his "standing" protest was timely is also without merit. We held under similar circumstances in Thelma M. Eckert, 115 IBLA 43 (1990), that a purported "standing" protest will not satisfy the requirement delineated in ANILCA that objecting parties, within 180 days following the effective date of the Act, identify any conflict with an allotment application. In Eckert, we specifically rejected a claim that a conflict with the allotment reported prior to the enactment of ANILCA constituted a proper section 905 protest. The Board made this determination despite evidence of Eckert's cabin site being in conflict with the allotment claim. In fact, it was Eckert's improvements on the site, not unlike the present situation, that caused BLM prior to ANILCA to notify the Native allotment applicant of its intent to deny the allotment for failure to show the requisite use and occupancy of the land, absent submittal of proof demonstrating otherwise. Thus, we must conclude that Effemka's allotment was legislatively approved on the 180th day following the enactment of ANILCA.

[2] Further, section 905(e) of ANILCA, 43 U.S.C. § 1634(e) (1988), offers Almasy no relief. That section requires BLM to identify and adjudicate any "record entry or application" to determine whether it represents a valid existing right to which the Native allotment applicant's claim must be made subject. That section is inapplicable here as there was no entry or application "existing" on the 180th day after passage of ANILCA to be "identified and adjudicated." Almasy's notice of location of homesite never ripened into an application and, while his notice of location would have qualified as an entry, BLM declared the notice of location void in 1966 for failure to timely submit an application to purchase the homesite with the required proof of compliance with statutory and regulatory requirements. As Almasy did not appeal that decision, the doctrine of administrative finality bars reconsideration of that issue. See Ray L. Verg-In, 133 IBLA 1 (1995).

Finally, Almasy argues that his homesite claim should take precedence because his notice was filed before Effemka's Native allotment application. This argument must be rejected. The statutory right to an allotment does not vest until completion of the required period of 5-year use and occupancy and the filing of a timely application. However, once the preference right does vest, it relates back to the initiation of use and occupancy and preempts conflicting applications filed after that time. State of Alaska v. Bryant, 129 IBLA 35, 43 (1994); State of Alaska Department of Transportation and Public Facilities, 125 IBLA 291, 293 (1993) and cases cited.
We find nothing of record to dispute that the land claimed by Effemka was vacant and unappropriated on June 1, 1938, the date Effemka claimed he commenced use and occupancy.

To the extent appellant has raised arguments which we have not specifically addressed herein, they have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

John H. Kelly
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge